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No. 84-1070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON,
COMMISSION FOR THE BLIND,

Respondent.

On Writ Of Certiorari To The Supreme Court of The State of Washington

BRIEF FOR AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

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TABLE OF AUTHORITIES

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For the reasons herein stated, Americans United for Separation of Church and State, *amicus curiae*, respectfully submits that the decision by the Supreme Court of Washington State should be affirmed.

INTEREST OF THE AMICUS CURIAE

Since 1947, Americans United for Separation of Church and State (Americans United) has worked to preserve the constitutional principle of church-state separation, a vital cornerstone of religious liberty. Americans of many faiths and political viewpoints, and from all walks of life have come together in this organization to protect these liberties.

Americans United, with more than 50,000 members of various religious beliefs, and some of no belief, stands as a recognized organization working to preserve this Nation's heritage of religious freedom. From its offices in Washington, D.C., and California, and a network of members and volunteers in all 50 states, it is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United has been involved in almost every major case before this Court dealing with the Establishment Clause of the U.S. Constitution. It is particularly concerned with apparent efforts to dilute Establishment Clause protections through a misplaced reliance on the Constitution's Equal Protection Clause.

Amicus curiae has secured the written consent of both the Petitioner and Respondent to the filing of the brief herein.

ARGUMENT

The Supreme Court of Washington determined that providing state financial vocational assistance to a blind person studying to be "a pastor, missionary or church youth director" at the Inland Empire School of the Bible violated the Establishment Clause of the First Amendment to the U.S. Constitution.[1] In doing so, that Court

[1] It is likely that the State Supreme Court would have reached essentially the same decision if it had relied upon the "religion clauses" of the Washington State Constitution at Article 1, Section 11, and Article 9, Section 4. The state Court observed: "Since our State Constitution requires a far stricter separation of church and state than the federal Constitution . . . it is unnecessary to address the constitutionality of the aid under our State Constitution." 689 P.2d 53 at 55 (1984). Ironically, if the state Court should consider this matter once again, a similar result as is now before this Court could be expected under state law.

properly relied upon and applied the criteria articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971). It also followed the counsel of *Hunt* v. *McNair*, 413 U.S. 734 (1973), when it concluded that: "The provision of financial assistance by the State to enable someone to become a pastor, missionary or church youth director clearly has the primary effect of advancing religion." 689 P.2d 53 at 56.

Of particular concern, however, to Americans United is the contention inherent in the Petitioner's argument that a state—under the Equal Protection Clause of the U.S. Constitution—can be compelled to prepare a person for a religious ministry and thus to violate if not the Federal Constitution then its own.

This issue was considered in *Luetkemeyer* v. *Kaufmann*, 364 F.Supp. 376 (WD Mo. 1973), *Aff'd.* 419 U.S. 888 (1974). There the state of Missouri provided bus transportation to public school children but refused to do so for certain private school children. A taxpayer who sent his children—in accordance with his religious conscience—to a school operated by the Roman Catholic Church challenged the state's refusal. He argued that in denying bus transportation to parochial school children the state had violated the Equal Protection Clause of the U.S. Constitution.

The District Court, relying upon that state's constitution, determined to be stricter than the Establishment Clause of the U.S. Constitution, rejected the taxpayers equal protection argument. The Court concluded that the Missouri program of excluding private school children from the transportation service was in pursuit of a valid state interest in "maintaining a very high wall between church and state." 364 F.Supp. 376 at 383. In so doing, the Court rejected the parents' Equal Protection Clause

argument. The U.S. Supreme Court affirmed this decision at 419 U.S. 888 (1974).[2]

In similar fashion, the state of Washington's denial of educational benefits—whether premised upon the Establishment Clause of the U.S. Constitution or of the State's own Constitution—should not be construed as a violation of the equal protection rights of the U.S. Constitution.

A comparable Equal Protection Clause argument was made to the Court in *Norwood* v. *Harrison*, 413 U.S. 455 (1973). In that case, the state of Mississippi purchased textbooks and lent them to students in both public and private schools without reference to whether any participating private school had racially discriminatory policies. This Court concluded that while private schools have a right to exist and operate, the state is not required by the Equal Protection Clause to provide assistance to private schools equivalent to that it provides to public schools.

In rejecting the equal protection argument, Chief Justice Burger observed:

> Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or

[2] Such an affirmance is a decision on the merits entitled to precedental weight. See *Edelman* v. *Jordan*, 415 U.S. 651 (670-671); *c.f. Cincinnati N.O. & T.P.R. Co.* v. *United States*, 400 U.S. 932, 935 (1970).

> textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance." *See San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

In the same way, the State of Washington can effect its own constitutional objective and maintain a desired neutrality under the Establishment Clause by refusing to educate a person to become "a pastor, missionary or church youth director" at the Inland Empire School of the Bible. To pursue such a policy would not violate the Equal Protection Clause. While a state may not prohibit a school from training a clergyman, nor a person be prevented from pursuing such a profession, it does not follow that such schools must—as a matter of right—receive state aid to educate clergymen.

As the Court observed in *Sloan* v. *Lemon*, 413 U.S. 825 at 834-35 (1973): "The Equal Protection Clause has never been regarded as a bludgeon with which to compel a state to violate other provisions of the Constitution."

CONCLUSION

The State of Washington, relying upon the Establishment Clause of the First Amendment, has refused to fund the Petitioner's pursuit of a career as "a pastor, missionary or church youth director."

The decision of the Supreme Court of Washington should be affirmed on the Establishment Clause rationale. Additionally, this Court must not permit itself to be placed in the position of ordering a state to provide—directly or indirectly—benefits for the advancement of religion. Such a consequence is impermissible and could have disastrous results. The Equal Protection Clause does not provide Petitioner a remedy.

For these reasons, Americans United requests this Court to affirm the decision of the Supreme Court of Washington.

Respectfully submitted,

LEE BOOTHBY